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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF SOUTH DAKOTA, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION

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Certain other interested States did not have an opportunity to fully examine the merits of the question presented prior to the printing of this Brief. The Office of the Clerk will be advised directly if those States elect to join in the views expressed herein.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	3
ARGUMENT	3
I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS WAS REACHED WITHOUT THE DETAILED ANALYSIS MANDATED BY THIS COURT	3
II. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DISREGARDS CLEAR INDICATIONS OF LEGISLATIVE INTENT AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT	5
III. THE DECISION OF THE COURT BELOW IS ONE IN A SERIES OF DECISIONS WHICH REFLECT AN INCONSISTENT APPLICATION OF THE PRINCIPLES EXPRESSED BY THIS COURT AND WHICH UNDERMINE THOSE PRINCIPLES	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	Page
Appawora v. *Brough*, 431 U.S. 901 (1977)	18
City of New Town v. *United States*, 454 F.2d 121 (8th Cir. 1972)	14,15,16
DeCoteau v. *District County Court*, 420 U.S. 425 (1975)	*passim*
Dick v. *United States*, 208 U.S. 340 (1908)	8
Lafferty v. *State ex rel. Jameson*, 80 S.D. 411, 125 N.W.2d 171 (1963)	14, 17
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1904)	11
McClanahan v. *Arizona State Tax Commission*, 412 U.S. 164 (1973)	2
Puyallup Tribe, Inc. v. *Department of Game*, 433 U.S. 165 (1977)	5
Red Lake Band of Chippewa Indians v. *Minnesota*, No. 79-1420 (8th Cir., January 31, 1980)	15
Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977)	*passim*
Rosebud Sioux Tribe v. *Kneip*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977)	11,15
Rosebud Sioux Tribe v. *Kneip*, 375 F. Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977)	4
Seymour v. *Superintendent*, 368 U.S. 351 (1962).	6,16
Stankey v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977)	3,4,17
State v. *Barnes*, 81 S.D. 511, 137 N.W.2d 683 (1965)	14,17
State v. *Sauter*, 48 S.D. 409, 205 N.W. 25 (1925)	14,17

	Page
United States v. *A Juvenile*, 453 F. Supp. 1171 (D.S.D. 1978), *rev'd sub nom. United States* v. *Dupris*, 612 F.2d 319 (8th Cir. 1979)	*passim*
United States v. *Dewey County*, 14 F.2d 784 (D.S.D. 1926), *aff'd on other grounds*, 26 F.2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928)	17
United States v. *Dupris*, 612 F.2d 319 (8th Cir. 1979)	*passim*
United States v. *LaPlant*, 200 F. 92 (D.S.D. 1911)	14,16
United States v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977)	7,14,15, 16
United States v. *Pearson*, 231 F. 270 (D.S.D. 1916)	17
United States ex rel. Condon v. *Erickson*, 478 F.2d 684 (8th Cir. 1973)	*passim*
United States ex rel. Cook v. *Parkinson*, 525 F.2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977)	6,12,15, 16
United States ex rel. Feather v. *Erickson*, 489 F.2d 99 (8th Cir. 1973), *rev'd sub nom. DeCoteau* v. *District County Court*, 420 U.S. 425 (1975)	15,16
United States ex rel. Miner v. *Erickson*, 428 F.2d 623 (8th Cir. 1970)	17

Page

STATUTES

Act of April 23, 1904, 33 Stat. 254 7,11
Act of April 21, 1906, 34 Stat. 124 11
Act of March 2, 1907, 34 Stat. 1230 6,7,11,12
Act of May 29, 1908, 35 Stat. 450 ..... *passim*
Act of February 17, 1910, 36 Stat. 196 7
Act of May 27, 1910, 36 Stat. 440 11,12
Act of May 30, 1910, 36 Stat. 448 ..... *passim*
Presidential Proclamation of August 19, 1909, 36 Stat. 2500 13

CONGRESSIONAL MATERIALS

S. Rep. No. 439, 60th Cong., 1st Sess. (1908) 9,10,11
H.R. Rep. No. 1539, 60th Cong., 1st Sess. (1908) 7,9,10,11
S. Rep. No. 68, 61st Cong., 2d Sess. (1910) 8
S. Rep. No. 518, 61st Cong., 2d Sess. (1910) 8
H.R. Doc. No. 711, 61st Cong., 2d Sess. (1910) .. 8
42 Cong. Rec. 7005 (1908) 7
45 Cong. Rec. 1502, 1647, 1769-70 (1910) 13

ADMINISTRATIVE MATERIALS

[1906] Comm. Indian Affairs Ann. Rep. 11

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INTEREST OF AMICI CURIAE

The State of South Dakota and the States and Counties joining herein have a general interest in the manner in which any question of federal Indian law is resolved. With respect to the instant case, the issue of reservation status is of particular importance to those states containing historic reservation areas, such as certain

Amici States here, since the resolution of this issue can significantly affect the extent to which the States and their subdivisions may exercise jurisdiction within those areas. Thus, the principles and guidelines used by the courts in resolving the question of reservation status are of paramount concern to the States joining in this brief.

In addition, the States of South Dakota and North Dakota and the four Amici Counties have a special interest in the outcome of the instant case, because on that outcome depends the extent to which these States and their political subdivisions may exercise jurisdiction over the particular area affected by the Act of Congress in question.[1] If the opinion of the Court of Appeals is left to stand, its holding that the area in question remains within the reservation boundaries will divest them of much of their civil, criminal, administrative, and regulatory jurisdiction within that area. *See, e.g., DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); *McClanahan* v. *Arizona State Tax Commission*, 412 U.S. 164 (1973).

In spite of the recent holdings of this Court in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the court below has refused to depart from its earlier decision in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973). On the other hand, the South Dakota Supreme Court has recognized the importance of the intervening decisions of this Court and has come to a

[1] The 1908 Act in dispute opened portions of both the Cheyenne River Reservation in South Dakota, and the Standing Rock Reservation in South Dakota and North Dakota. Dewey and Ziebach Counties lie within the original boundaries of the Cheyenne River Reservation; Corson and Sioux Counties lie within the original boundaries of the Standing Rock Reservation.

conclusion opposite to that of the court below. *Stankey* v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977). Thus, as in *DeCoteau, supra* at 430-31, there exists a conflict between the State Supreme Court and the Court of Appeals which requires resolution by this Court.

Because the decision below, if allowed to stand, will seriously undermine the principles applicable to such questions as expressed by this Court in its previous decisions, the Amici States and Counties submit this brief in support of the petition for certiorari.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case set forth in the Petition for Writ of Certiorari.

ARGUMENT

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS WAS REACHED WITHOUT THE DETAILED ANALYSIS MANDATED BY THIS COURT.

In two relatively recent cases, this Court has outlined the proper judicial approach to questions of the disestablishment or diminution of historic Indian reservations by acts of Congress. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). As specified by this Court, the requisite analysis involves an examination of several factors: the face of the Act at issue, its legislative history and surrounding circumstances, and the subsequent jurisdictional history. *Rosebud, supra* at 587, 603; *DeCoteau, supra* at 442, 444. Following the mandate of those

decisions, the District Court in the instant case undertook an exhaustive review of the materials relevant to each of the above factors and, in a thirty-page opinion, ruled that the 1908 Cheyenne River Act was intended by Congress to disestablish the portion of the reservation opened by the Act. *United States* v. *A Juvenile*, 453 F. Supp. 1171 (D.S.D. 1978), *rev'd sub nom. United States* v. *Dupris*, 614 F.2d 319 (8th Cir. 1979).[2] Judge McMillian of the Court of Appeals panel below arrived at the same conclusion following a thorough examination of the same material. *United States* v. *Dupris*, 612 F.2d 319, 323-41 (8th Cir. 1979) (McMillian J., dissenting). In addition, the same result was reached by the South Dakota Supreme Court in 1977 in its well-reasoned opinion in *Stankey* v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977).

Nevertheless, two members of the court panel below declined to engage in the comprehensive analysis required by *Rosebud* and *DeCoteau* and instead relied on the Eighth Circuit's earlier decision in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973). *United States* v. *Dupris*, 612 F.2d 319, 320 (8th Cir. 1979). *Condon* preceded both *DeCoteau* and *Rosebud*, and, as explained by the District Court, at the time it was decided,

> the breadth of inquiry allowed by *DeCoteau* and *Rosebud* was not recognized as the applicable guide to statutory construction in a case of this type. Traditional and more limited methods of statutory construction were at that time relied upon. Operating within such a limited framework, the wealth of

[2] The case was decided by Judge Andrew W. Bogue, who also decided the Rosebud case at the District Court level. *See Rosebud Sioux Tribe* v. *Kneip*, 375 F. Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977).

> materials available here could not be considered. [*Condon*] is therefore not viable.

453 F. Supp. at 1201. *See also Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 173 n.11 (1977).

While the majority opinion of the Court of Appeals refers to some of the arguments suggested by the material available to the Court, it does so in a summary fashion and only in response to Judge McMillian's dissent. 612 F.2d at 320-23. The failure of the Court of Appeals to engage in the comprehensive analysis required by the decisions of this Court undermines the continuing force of those decisions and necessitates review of the decision below.

II. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DISREGARDS CLEAR INDICATIONS OF LEGISLATIVE INTENT AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court has stated that in determining questions such as the one presented here, "[t]he underlying premise is that congressional intent will control." *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977). Despite this clear statement, the Court of Appeals ignored the manifest intent of Congress to disestablish the portion of the original Cheyenne River Reservation opened by the Act of May 29, 1908, 35 Stat. 460. In so doing, the court below not only failed to heed the general mandate of this Court, but implicitly rejected the specific holdings of this Court in *Rosebud* and in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

As stated in the Petition for Writ of Certiorari, a congressional intent to diminish the boundaries of the

Cheyenne River Reservation is plainly evident from the face of the 1908 Act. Section 2 of the Act refers to the area unaffected by the Act as "the reservation thus diminished", and Section 9 refers to portions of the opened land as "part of the public domain". §§ 2, 9, Act of May 29, 1908, 35 Stat. 460, 461, 464 (emphasis added). These expressions are unambiguous and can be interpreted only as indications of an underlying purpose to disestablish the affected portion of the original Reservation. *See Rosebud, supra* at 589 n.5 ("public domain"), 613-14 ("diminished"); *DeCoteau, supra* at 446 ("public domain"); *Seymour* v. *Superintendent,* 368 U.S. 351, 354 (1962) ("public domain", "diminished"); *United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120, 122 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977) ("diminished").

The operative language of the 1908 Cheyenne River Act authorized the Secretary of the Interior to "sell and dispose of" the land described. § 1, 35 Stat. 460. While this language alone is not determinative, *see Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584, 586-87 (1977), it is certainly consistent with disestablishment, for this same wording appeared in the 1907 and 1910 Rosebud Acts which were found by this Court to have disestablishment effect. *Rosebud, supra* at 605-15. *See also United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975). Although the 1910 Rosebud Act, unlike the Act here in issue, also referred to the area opened by the Act, as "the tract ceded", § 1, 36 Stat. 448 (1910), this wording does not appear in the 1907 Rosebud Act which was unequivocally held by this Court in *Rosebud* to have the effect of disestablishment. While it is true that the presence of cession language in a statute is reflective of an intent to disestablish, it does not follow that the absence of such language is relevant, since it is not apparent that Congress

afforded the words any special weight in defining its intent. As this Court has made clear, the absence of words of cession in the 1907 Rosebud Act did not signify an intent different from that of a 1904 Act which did contain such language. *Rosebud, supra* at 608-09.

In addition, as explained in the Petition, Section 7 of the 1908 Act contains the same provision relating to school lands as is found in all three Rosebud Acts and which was fully explicated by this Court in *Rosebud, supra* at 599-601, 608 n.36. Rather than even acknowledge this Court's interpretation, the court below chose instead to rely on its holding in *United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir. 1977). However, the legislative history pertaining to this provision indicates that it was included for precisely the same reasons as those discussed in *Rosebud* and, as in *Rosebud,* supports a conclusion of disestablishment.[3] *See* H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 2 (1908); 42 Cong. Rec. 7005 (1908).

Of additional importance is the provision added to the 1908 Act which prohibited the introduction of liquor into the opened area for a period of 25 years. § 8, Act of February 17, 1910, 36 Stat. 196. This provision is identical to the provision of the same year fully considered by this Court in *Rosebud, supra* at 613 & n.47. The 1910 Rosebud provision was found to be of particular importance in that case, since it would have been completely superfluous if the area opened by that Act had remained "Indian country". The fact that the provision in the present case was added by way of amendment makes this interpretation particularly apposite, since it is improbable that Congress went to such trouble to achieve a wholly

[3] As the District Court concluded, "There is no meaningful distinction that can be made between section 7 of this Act and the comparable sections construed in *Rosebud*. . . ." 453 F. Supp. at 1195.

redundant result. However, the court below, again without addressing the holding of *Rosebud,* found this argument to be of very little weight on the grounds that the Indians requested the amendment. 612 F.2d at 322. The logic of this distinction is not readily apparent, since the fact remains that the amendment would have been superfluous in an existing reservation, regardless of who favored the proposal.[4]

[4] The legislative material from which the court's conclusion is derived does not directly relate to the amendment in question, but is instead a report of a different bill which was aimed at the opening of that portion of the original Cheyenne River Reservation left unopened by the 1908 Act. *See* S. Rep. No. 518, 61st Cong., 2d Sess. at 4-5 (1910).

The liquor provision added to the 1908 Act was introduced on the Senate floor by Senator Gamble, the sponsor of the 1908 Act, in the form of an addition to a bill amending the 1908 Act in other respects. 45 Cong. Rec. 1647 (1910). Although the provision was passed by the Senate without debate, the discussion on the House floor makes it clear that the amendment was not thought to be superfluous. *See* 45 Cong. Rec. 1769-70 (1910). This conclusion is reinforced by a letter on the subject from the Secretary of the Interior to the Speaker of the House, which states in part:

> The Supreme Court of the United States in Dick *v.* The United States . . . sustained a provision similar to that contained in the proposed bill prohibiting the introduction of intoxicating liquors upon lands ceded by Indians for a period of twenty-five years.
>
> The department can not too strongly urge the necessity for legislation of this kind to enable it to suppress the liquor traffic with the Indians.

H.R. Doc. No. 711, 61st Cong., 2d Sess. at 1 (1910). As noted by this Court in *Rosebud* at 613 n.47, the *Dick* decision referred to in the above passage validated the statutory extension of the Indian country liquor prohibitions into non-reservation areas. *See Dick* v. *United States,* 208 U.S. 340 (1908).

From the foregoing, it is clear that a congressional intent to disestablish the opened portion of the original Cheyenne River Reservation appears on the face of the 1908 Act, despite the Court of Appeals' unsubstantiated assertion to the contrary. *See* 612 F.2d at 321.

The legislative history of the 1908 Cheyenne River Act confirms that its underlying purpose was disestablishment of the affected area. As stated in the Senate Report of the legislation,

> [t]he lands reserved for the use of the Indians upon both *reservations as diminished,* in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes.

S. Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908) (emphasis added). *See also* H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 3 (1908).

Even more explicit is the report of James McLaughlin, the Indian Inspector sent to negotiate with the Tribes concerning the land to be opened under the proposed legislation. The significance of this report was that it was expressly adopted by both House and Senate Committees as a supplemental report and is therefore reflective of the Committees' views and understanding of the legislation. *See* S. Rep. No. 349, pt. 2, 60th Cong., 1st Sess. at 1-4 (1908); H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 5-8 (1908). McLaughlin's report contains multiple references to new boundary lines and the cession and relinquishment of the lands to be opened,[5] and leaves no doubt as to the commonly understood effect of the Act.

[5] For example, the report contains the following passages:

> I deemed it best to submit a definite proposition as to the tract I thought the Indians should *relinquish.* . . .

(footnote continues)

Also included in the Senate and House reports with Inspector McLaughlin's report is a transcript of the proceedings of McLaughlin's councils with the Indians. S.Rep. No. 439, pt. 2, *supra* at 4-24; H.R. Rep. No. 1539, *supra* at 8-28. These materials leave no doubt as to the contemplated effect of the 1908 Act. Throughout these proceedings, both McLaughlin and the Indians spoke of the cession and relinquishment of lands and the location of new boundaries.

The court below dismissed these materials apparently on the grounds that they do not unambiguously demonstrate that an agreement was reached with the Indians. 612 F.2d at 322. This reasoning is curious, since the significance of an agreement is not that its existence is essential, but rather that if an agreement does exist, its contents may be indicative of congressional intent. As noted above, the intent of Congress is controlling; moreover, Congress has the power to unilaterally alter reservation boundaries without the consent of the tribe. *Rosebud,*

(footnote continued)

> In order that the Indians might fully understand the boundaries of the proposed *diminished reservation* I indicated with a blue pencil on a map of South Dakota the area which I believed would be to the best interests of the Indians to *relinquish*. . . .
>
> . . . .
>
> The opening of the tracts . . . would segregate the Standing Rock and Cheyenne River reservations by opening a strip 18 miles in width between them, and give to each of said agencies legal subdivision outboundaries and *compact diminished reservations*. . . .
>
> . . . .
>
> . . . [T]he Indians realized it would be advisable for them to consent to the opening of a portion of their surplus lands with the hope of thereby *securing a diminished reservation.*

S.Rep. No. 439, pt. 2, 60th Cong., 1st Sess. at 1-3 (1908); H.R.Rep. No. 1539, 60th Cong., 1st Sess. at 5-7 (1908) (emphasis added).

supra at 587, 598; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). In the case of the Act at hand, Congress was clearly aware that it was acting pursuant to this power. *See* S. Rep. No. 439, *supra* at 4, H.R. Rep. No. 1539, *supra* at 3. *See also Rosebud, supra* at 588, 594, 598 & n.19.

An examination of the historical circumstances surrounding the enactment of the 1908 Cheyenne River Act allows only one conclusion; that is, that Congress was acting under the same basic assumption that prevailed during the passage of a series of contemporaneous and substantially identical acts opening surplus lands in South Dakota. *See* Act of April 23, 1904, 33 Stat. 254 (Rosebud Reservation); Act of April 21, 1906, 34 Stat. 124 (Lower Brule Reservation); Act of March 2, 1907, 34 Stat. 1230 (Rosebud Reservation); Act of May 27, 1910, 36 Stat. 440 (Rosebud Reservation); Act of May 30, 1910, 36 Stat. 448 (Pine Ridge Reservation). These statutes, along with the statute here at issue, were enactments of the prevailing federal policy which favored the reduction of the size of the Indian reservations and the opening of the surplus lands to non-Indian settlement. *See, e.g., Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87, 102 (8th Cir. 1975), *aff'd,* 430 U.S. 584 (1977); *United States* v. *Dupris,* 612 F.2d at 326-30 (McMillian, J., dissenting); [1906] Comm. Indian Affairs Ann. Rep. 80-81.[6] The three Rosebud statutes were

[6] The report states in part as follows:

> I am convinced that a wise provision in any general allotment act would be to allow not less than 5 or more than 40 acres of irrigable land, or not more than 640 acres of grazing land, to each Indian, in the discretion of the Secretary of the Interior. This would better most existing conditions and enable the Department to care properly for the interests of all concerned. Another result which could hardly help flowing from it would be the *more rapid opening of reservations and the consequent dissolution of the generally condemned reservation system.* . . .

[1906] Comm. Indian Affairs Ann. Rep. 81 (emphasis added).

all found by the Court to have the underlying purpose of disestablishing the opened lands, *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977), and the Pine Ridge Act was found to have the same effect in *United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977).

A comparison of the language and legislative history of the 1908 Cheyenne River Act with that of the 1907 and 1910 Rosebud Acts and the 1910 Pine Ridge Act reveals that the statutes cannot be distinguished on any significant grounds. This close similarity is a strong indication of an identity of purpose among these Acts. *Cf. Rosebud, supra* at 608-09, 612-13 (similarities between various Rosebud Acts); *DeCoteau* v. *District County Court,* 420 U.S. 425, 446 (1975) (similarities between contemporaneously ratified cession agreements); *Cook, supra* at 123 (similarities between Pine Ridge Act and Rosebud Act). In addition, the Rosebud and Pine Ridge Acts are part of the historical context of the passage of the Cheyenne River Act, and are therefore highly relevant to the question of congressional intent. *See Rosebud, supra* at 606 n.30.

In light of the foregoing, the only reasonable conclusion is that Congress, in passing each of these surplus land acts, acted under the same understanding of the purpose and effect of the acts. In the absence of any evidence to the contrary, it is inconceivable that Congress would enact several virtually identical statutes during the same time period and concerning the same general subject matter and intend them to have profoundly different results. There is not one indication in the legislative history that Congress intended that the 1908 Cheyenne River Act have the opposite effect of the other South Dakota surplus land statutes and leave the status of the affected area

unchanged. The lack of extensive congressional debate[7] does not create doubt as to the effect of the Act but is instead a clear indication that Congress meant nothing different here than it had in other similar acts and was operating under the commonly understood assumption that lands opened to settlement would no longer be a part of the reservation.[8] *See United States* v. *A Juvenile,* 453 F. Supp. at 1187.

A final consideration in the determination of the issue at hand is the subsequent jurisdictional history of the area opened by the 1908 Act. Here, as in *Rosebud,* the delineation of jurisdiction during the early years immediately following the opening of the area in 1909[9] is somewhat unclear. Nevertheless, the available evidence indicates that the State of South Dakota consistently exercised jurisdiction over non-Indian land in the opened area for several decades until the decision in *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (8th Cir. 1973).[10] *See*

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[7] In this regard, the legislative history of the 1908 Cheyenne River Act is comparable to that of the 1907 and 1910 Rosebud Acts and the 1910 Pine Ridge Act.

[8] This assumption is illustrated by the following statement of Senator Gamble, the Senate sponsor of all these surplus land acts, with respect to the Pine Ridge legislation:

> I may say . . ., referring to the enabling act providing for the admission of North and South Dakota, Montana, and Washington, that sections 16 and 36 in each township were granted to the separate States . . . for the benefit of the common schools; but in the States where there were Indian reservations, it provided that the grant should not take effect until the lands were *open to settlement, or, in other words, became a part of public domain. By the passage of the bill in question the lands so opened become a part of the public domain and open to settlement. . . .*

45 Cong. Rec. 1502 (1910) (emphasis added).

[9] *See* Presidential Proclamation of August 19, 1909, 36 Stat. 2500.

[10] The *Condon* case arose out of a state prosecution. *See United States ex rel. Condon* v. *Erickson,* 478 F.2d at 685.

United States v. *A Juvenile,* 453 F. Supp. at 1199. *See generally United States* v. *LaPlant,* 200 F. 92 (D.S.D. 1911); *State* v. *Barnes,* 81 S.D. 511, 137 N.W.2d 683 (1965); *Lafferty* v. *State ex rel. Jameson,* 80 S.D. 411, 125 N.W.2d 171 (1963); *State* v. *Sauter,* 48 S.D. 409, 205 N.W. 25 (1925). *Cf. Rosebud, supra* at 603-05; *DeCoteau, supra* at 449. As in *Rosebud,* the recent interruption of the "long-standing assumption of jurisdiction by the State" is unjustified. *Rosebud, supra* at 604-05.

It is clear from the foregoing discussion that the decision below is directly at odds with this Court's decisions in *Rosebud* and *DeCoteau.* This conflict can only serve to undermine the principles and rulings set forth in those cases. In fact, the failure of the court below to confront the directly applicable holdings in *Rosebud* amounts to an implicit rejection of that decision. This is reflected in the majority opinion below, in which the court states:

> Simply stated, South Dakota has, at times, asserted criminal jurisdiction over *this and other reservations* and, at times, it has not. We acquiesced in this exercise until Judge Stephenson carefully examined the matter in [*Condon*] in 1973, and Judge Bright reexamined it in [*United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir.)] in 1977.... *We adhere to their decisions and to our opinion in* [*City of New Town* v. *United States,* 454 F.2d 121 (8th Cir. 1972)].

612 F.2d at 323 (emphasis added). Since *Long Elk* and *New Town* concerned surplus land acts not involved in this case, the above passage must be read as a general statement of the court's view of the state of the law regarding the disestablishment of historic reservation areas opened by surplus land statutes. Since no mention is made of this Court's decisions in *Rosebud* and *DeCoteau,*

or, for that matter, of the Eighth Circuit's own decisions in *Rosebud* and *Cook,* the implication of the passage is that the Court of Appeals believes those cases to be wrongly decided.[11] Therefore, it is important that the decision below be reviewed, not merely to correct a result contrary to manifest congressional intent, but to reaffirm the validity of the principles expressed by this Court.

III. THE DECISION OF THE COURT BELOW IS ONE IN A SERIES OF DECISIONS WHICH REFLECT AN INCONSISTENT APPLICATION OF THE PRINCIPLES EXPRESSED BY THIS COURT AND WHICH UNDERMINE THOSE PRINCIPLES.

The Eighth Circuit has in the past decade decided a number of cases involving the effect of surplus land acts of Congress on reservation boundaries. *See Red Lake Band of Chippewa Indians* v. *Minnesota,* No. 79-1420 (8th Cir., January 31, 1980); *United States* v. *Dupris,* 612 F.2d 319 (1979); *United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir. 1977); *United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975); *cert. denied,* 430 U.S. 982 (1977); *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87 (8th Cir. 1975), *aff'd,* 430 U.S. 584 (1977); *United States ex rel. Feather* v. *Erickson,* 489 F.2d 99 (8th Cir. 1973), *rev'd sub nom. DeCoteau* v. *District County Court,* 420 U.S. 425 (1975); *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (8th Cir. 1973); *City of New Town* v. *United States,* 454 F.2d 121 (8th Cir. 1972). Despite the recent definitive decisions of this Court in *Rosebud* and *DeCoteau,* no consistent application of the principles enu-

[11] It should be noted that the suggestion that *Rosebud* is incorrect is inherent in the historical argument made by the United States before the District Court. *United States* v. *A Juvenile,* 453 F.Supp. at 1175-76.

merated by this Court has emerged. The decisions of the Eighth Circuit since *Rosebud* and *DeCoteau* cannot be reconciled, and some, including that in the instant case, directly conflict with the decisions of this Court. The inconsistency inherent in this line of decisions not only creates undue confusion as to the applicable rules of law, but threatens the continuing vitality of the decisions of this Court.

After the 1962 decision of this Court in *Seymour* v. *Superintendent*, 368 U.S. 351, the Eighth Circuit, relying on its interpretation of *Seymour*, held in three instances that Indian reservations or portions thereof had not been disestablished by the acts of Congress at issue. *See United States ex rel. Feather* v. *Erickson, supra; United States ex rel. Condon* v. *Erickson, supra; City of New Town* v. *United States, supra.* This trend was halted with the reversal by this Court, in *DeCoteau*, of the *Feather* decision. The two cases decided by the Eighth Circuit following *DeCoteau*, which, as noted above, involved statutes virtually identical to the 1908 Cheyenne River Act, resulted in a finding of congressional intent to diminish the reservations involved. *See United States ex rel. Cook* v. *Parkinson, supra; Rosebud Sioux Tribe* v. *Kneip, supra.* Since this Court's decision in *Rosebud*, however, the Eighth Circuit's decisions have taken a sharply different course. The court's 1977 decision in *United States* v. *Long Elk, supra*, involving a 1913 statute much like those considered in *Rosebud* and the 1908 Act in dispute here, arrived at a conclusion opposite to that reached in *Rosebud*, relying in part on the earlier decision in *Condon*. A similar result was reached in the instant case.

Nowhere is this conflict of decisions more evident than in the judicial treatment of the 1908 Cheyenne River Act. In *United States* v. *LaPlant*, 200 F. 92 (D.S.D. 1911), the District Court held that the 1908 Act had the effect of diminishing the reservation boundaries by excluding the area opened to settlement. This continued as the state of the law for over sixty years, as is indicated in the decisions of the South Dakota Supreme Court. *See, e.g., State* v. *Barnes*, 81 S.D. 511, 137 N.W.2d 683 (1965); *Lafferty* v. *State ex rel. Jameson*, 80 S.D. 411, 125 N.W.2d 171 (1963); *State* v. *Sauter*, 48 S.D. 409, 205 N.W. 25 (1925). *See also United States* v. *Dewey County*, 14 F.2d 784, 785 (D.S.D. 1926), *aff'd on other grounds*, 26 F.2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928); *United States* v. *Pearson*, 231 F. 270, 271 (D.S.D. 1916). In 1970, the suggestion that the reservation remained intact after the 1908 Act was made in a dissent from the Eighth Circuit's opinion in *United States ex rel. Miner* v. *Erickson*, 428 F.2d 623, 627 n.11 (8th Cir. 1970) (Lay, J., dissenting). In 1973, this argument was accepted in *United States ex rel. Condon* v. *Erickson, supra*, and *LaPlant* was overruled. Subsequently, in light of the intervening decisions of this Court in *DeCoteau* and *Rosebud*, the question was reexamined by the South Dakota Supreme Court in *Stankey* v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977). The court in *Stankey*, relying on the decisions in *Rosebud*, found that the 1908 Act had the effect of disestablishing the opened portion of the original reservation. Two years later, however, the Eighth Circuit in the instant case reaffirmed *Condon*, thus tacitly rejecting the ruling in *Stankey*.

The uncertainty regarding the proper application of the guidelines articulated by this Court is clearly evident from the above discussion. The conflicting decisions in the Eighth Circuit demonstrate that this uncertainty persists despite the decisions of this Court in *Rosebud* and *DeCoteau*, and the state of law concerning the important

jurisdictional issues involved remains unsettled. This situation, as evidenced by the opinion below, erodes the principles and guidelines enunciated in *Rosebud* and *DeCoteau*, and it therefore requires authoritative resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The matter should be scheduled for argument on the merits, or, in the alternative, be remanded to the Court of Appeals for further consideration in light of *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). *See Appawora* v. *Brough*, 431 U.S. 901 (1977) (case involving similar issue remanded for consideration in light of *Rosebud*).

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